APPENDIX 1

United States Department of the Interior

OFFICE OF THE SOLICITOR
ANCHORAGE REGION
510 L Street, Suite 408
Anchorage, Alaska 99501

IN REPLY REFER

March 17, 1980

MEMORANDUM

To: State Director
Bureau of Land Management

From: Attorney-Advisor
Office of the Regional Solicitor
Alaska Region

Subject: Trespass Enforcement Authority
on ANCSA Reserved Easements

By a memorandum of January 17, 1980 you advised us that "[m]any Native corporations have voiced concern pertaining to the possible trespass on their lands that may result from the use of easements reserved pursuant to ANCSA." The following possible trespass situations were set out for consideration:

1. The easement user strays from an easement and trespasses on adjoining private (Native Corp.) lands, or

2. The easement user utilizes the lands within the boundaries of an easement for purposes other than provided for in the reservation but does not injure, impair, or obstruct the use of the easement or subject the holder to extra labor and expense in keeping it in repair, or

3. The easement user utilizes the lands within the boundaries of an easement for purposes other than provided for in the reservation and injures, impairs, or obstructs the authorized use of the easement or subjects the holder to extra labor and expense in keeping it in repair.

For the reasons discussed below, we agree with your original conclusion that the BLM should investigate and take appropriate action to abate unauthorized uses only as described in situation 3. As will be seen, we also agree with the reasoning from your memorandum that:

> Although the easement regulations specify that all uses not specifically reserved are prohibited, the situations described in items 1 and 2 above are trespasses on property rights not reserved to the easement holder; therefore, it appears investigation or involvement by the easement holder should not be permitted as long as the easement is not being obstructed or damaged.

DISCUSSION

An easement is the right of one to use the land of another for a specific purpose or purposes and is not a right of possession in the sense of being able to exclude others. See, Meyers v. United States, 180 Ct. Cl. 521, 532, 378 P.2d 696, 703 (Ak. 1967) and Burby, Real Property, 64 (3d ed. 1965). Public easements, like the ones we are concerned with here, are merely easements ". . . the right to the enjoyment of which is vested in the public generally . . .."; Black's Law Dictionary, 600 (Revised 4th ed., 1968).

Accordingly, the corresponding rights and obligations of the easement owner and land owner have been explained as:

> An easement . . . gives no rights in the freehold [underlying land] except the right of use . . . The holder of the fee [the land owner] has the complete control over and use of the land up to the point where such control and use interferes with the use of the easement. The holder of an easement may use it for every normal, consistent means not forbidden by law or unreasonably interfering with the rights of the servient tenement [the underlying land].
>
> One who holds an easement for a right-of-way over property does not have the right to the possession of such property; but merely the right to use it. The right of possession remains in the owner.

* * * * *

> The use of an easement must be as reasonable and as little burdensome to the servient estate [the underlying land] as the nature of the easement and the purpose will permit.
>
> * * * * *
>
> The right of an owner of an easement and the right of the owner of the land are not absolute, but are so limited, each by the other, that there may be a reasonable enjoyment of both.

Vol. 2, Thompson, Real Property, 696, 699, § 427 (1961).

As pointed out in another legal commentary:

> Possession includes the right to exclude others from ~~the property. since~~ an easement is a non-possessory interest it does not carry with it the right to exclude others or to stop them from also enjoying the property.

Bernhardt, Real Property In A Nutshell, 174 (1975).

The commentator illustrated this point as follows:

> Steve, owning property in fee simple, grants a right-of-way across it to Dita. This gives her [Dita] an easement, not a possessory interest in Steve's property. She may use the road but she may not stop others from using it, except to the extent that their uses interfere with her use. But Steve, as possessor, may exclude all others (except Dita) from crossing his property, even though their crossings constitute no real injury to Steve. (Emphasis added.)

Id.

This is in full accord with the fact that an easement is not a possessory interest in land and that traditional possessory remedies, such as ejectment, are unavailable to an easement holder. See, Burby, Real Property, supra, 64, 65; Vol. 3, Powell, Real Property, 34-227, § 420 (1979); and Vol. II, American Law of Property, 311, 312, §§ 8.105 and 8.106 (1952). Rather, the easement holder is limited to seeking damages or injunctive relief from the land owner or

others if the easement holder's rights are interfered with. As so adeptly summarized in American Law of Property:

> The one entitled to the benefit of an easement is entitled, by virtue of having a property right, to legal protection against interference with the use authorized by the easement. Thus, he is entitled to damages against third persons who, without legal excuse, interfere with that use, and he is entitled to protection by injunction against threatened harm for which damages would be an inadequate remedy.
>
> The fact that an easement is not a possessory interest qualifies, to some extent, the degree of protection given to its owner. A possessory interest is protected from intrusion into the space possessed even though no damage is or can be shown to result from the intrusion. Non-possessory interests are, in general, protected only against actual or threatened harm. (Emphasis added.)

Vol. II, American Law of Property, supra.

CONCLUSION

Since only actual interference with and damage to the easement are actionable by the easement holder, due to the nature of an easement and the rights that attach to it, it is our opinion that the BLM can only take action when the authorized and reserved uses of the easement are interfered with. Where there is a trespass to the adjoining land, as in situation 1 of your examples, it is up to that land owner to take action. Similarly, use of an easement that does not interfere with or damage the easement holder's specific rights, as in situation 2 of your examples, is not actionable by the easement holder and it is only the underlying land owner who can take action on the unauthorized use.

If we can be of further assistance in this area, please do not hesitate to recontact us.

Dennis J. Hopewell

Dennis J. Hopewell
Attorney-Advisor

United States Department of the Interior

OFFICE OF THE SOLICITOR
ANCHORAGE REGION
510 L Street, Suite 408
Anchorage, Alaska 99501

IN REPLY REFER TO:

May 11, 1981

MEMORANDUM

To: State Director
Bureau of Land Management
Alaska

From: Attorney-Advisor
Office of the Regional Solicitor
Alaska Region

Subject: Jackalof-Windy Bay
ANCSA Easement EIN 1 D9 (016)

INTRODUCTION

In a memorandum of February 12, 1981, you presented a great deal of background information on the Jackalof-Windy Bay easement and asked for a legal opinion regarding several questions which have arisen in connection with the easement. An easement for the Jackalof-Windy Bay road was reserved to the United States under section 17(b) of the Alaska Native Claims Settlement Act (ANCSA). It provides access from Seldovia and Jackalof Bay on the south side of Kachemak Bay to Windy Bay on the Gulf of Alaska. According to the information provided to us, the easement has been heavily used by the public in recent years.

The portion of the road we are concerned with in this memorandum contains eleven log bridges and was built as a logging road under a contract with the State of Alaska while the land was tentatively approved for conveyance to the State. It was constructed over a period of years as the logging work progressed and was finished approximately ten to fifteen years ago. The surrounding land is now almost entirely owned by ANCSA village corporations. One bridge, the second to the last, has already collapsed and vehicular access to the end of the road no longer exists. Eight other bridges have been determined to be in imminent danger of failure and collapse by the BLM's District Engineer.

The Jackalof-Windy Bay easement is, consequently, not now reasonably safe for continued vehicle traffic. The road does, however, appear to be reasonably safe for motorbike and pedestrian travel. It would, according to the BLM's estimates, cost approximately $600,000 to rebuild all the bridges and bring the road up to its original condition.

It is in light of these facts that you have asked us to address the following questions:

1. In view of the fact that the road does not actually access the State Park, isolated State land parcels, or public waters on the Gulf (only by unbuilt proposed easements), does ANCSA Easement EIN 1 D9, in your opinion meet the current criteria of an ANCSA 17(b) easement?

2. By virtue of merely being the nominal easement holder, is the BLM or the U.S. liable for hazards and unsafe conditions caused by lack of maintenance whether or not these hazards are known to BLM? If so, is there any reasonable means we may take to relieve our liability?

3. Since the State of Alaska was the primary entity nominating this easement (D9 is ADF&G), can BLM transfer the easement to the State with or without State concurrence? If so, how?

4. Inasmuch as the State of Alaska built this road on TA'd State lands with what are actually, albeit indirectly, State monies, could it not be considered already a State-owned public road which would prevail against subsequent owners (i.e. Native corporation) even without an ANCSA 17b designation?

You have also asked us to address any other legal issues which may arise in our research, and we will do so as part of our discussion of the above enumerated questions.

DISCUSSION

I

DOES THE JACKALOF-WINDY BAY EASEMENT MEET THE CURRENT CRITERIA FOR A 17(b) EASEMENT?

From the materials provided to us, it appears that the portion of the Jackalof-Windy Bay road containing the failing bridges presently meets the 17(b) criteria. The BLM, the

State of Alaska, and the Seldovia Village Corporation have, however, all agreed that the portion of the road running from Seldovia along Jackalof Bay and on to Red Mountain is a State-owned road and should not be reserved under section 17(b) of ANCSA. A stipulation to that effect has been filed with the Alaska Native Claims Appeal Board and is pending the Board's approval in the Appeal of State of Alaska, ANCAB VLS 81-2. The basis for the stipulation is that the "Seldovia - Red Mountain Road" was conveyed to the State of Alaska by a quitclaim deed of June 30, 1959 issued pursuant to the Alaska Omnibus Act, P.L. 86-70 (73 Stat. 141). That stipulation does not affect the portion of the road running on to Windy Bay and containing the failing log bridges.

To be viable under section 17(b) of ANCSA, that portion of the Jackalof-Windy Bay easement must be reasonably necessary and presently used and must also guarantee access to publicly-owned lands or major waterways. 43 CFR §§ 2650.4-7(a)(1), (3), and (b)(1). The other requirements for 17(b) easements are set out at 43 CFR § 2650.4-7(a) and (b). Termination of a 17(b) easement, when its retention is no longer needed or if it is not used for the purpose for which it is reserved, is provided for in 43 CFR § 2650.4-7(a)(13). Prior to the termination of any 17(b) easement there must be proper notice and an opportunity for either the submission of written comments or a hearing. Id.

While your opinion request states that the road does not actually access State land or public waters on the Gulf of Alaska, the record indicates that the Jackalof-Windy Bay road does access some public lands or major waterways. At least, this was the finding of the BLM prior to its reservation of the road. See, Draft State Director Memos of February 1, 1980 for Seldovia and Port Graham, and Memorandum of June 16, 1977 from a BLM Realty Specialist concerning recommended easements for the village of Seldovia. If in fact the easement does not access public lands or major waterways, the easement can be terminated after notice and opportunity for either written comments or a hearing. 43 CFR § 2650.4-7(a)(13). A new study to establish this would have to be undertaken since the present record supports the determination that access to public lands or major waterways is provided by the road.

II

WHAT IS THE EXTENT OF THE UNITED STATES LIABILITY FOR 17(b) EASEMENTS AND WHAT CAN BE DONE TO RELIEVE THAT LIABILITY?

Since the United States is the owner of the 17(b) easements, potential liability exists under the Tort Claims Act.

28 U.S.C. §§ 1346(b) and 2671-2680.[1] Under that Act the United States is liable to the same extent as a private person is under the law of the state where the act or omission occurs. 28 U.S.C. §§ 1346(b) and 2674. An exception to liability exists for discretionary functions or duties. 28 U.S.C. § 2680(a).

In the framework of 17(b) easements, the decision on whether or not to maintain any particular easement is such a discretionary function. See, Carlson v. State, 598 P.2d 969, 973 (1979), and State v. Abbott, 498 P.2d 712 (Alaska, 1972). Accordingly, the decision to not maintain any given easement would not give rise to liability and the United States would not be liable for injuries or losses caused solely by a lack of maintenance. If, however, the decision is made to maintain a 17(b) easement, then there is a duty to exercise reasonable care in maintaining the easement. See, Indian Towing Company, Inc. v. United States, 350 U.S. 61, 64-65, 69 (1955); Hernandez v. United States, 112 F. Supp. 369, 370 (D. Hawaii 1953); Carlson v. State, supra 598 P.2d at 973; State v. Abbott, supra 498 P.2d at 722; and Adams v. State, 555 P.2d 235, 240-241 (1976). This reasonable duty, as it regards maintained roads, has been found to include 1) inspections at reasonable intervals; and 2) reasonable steps to diminish known danger within a reasonable time after their discovery. Jennings v. United States, 291 F.2d 880, 886-887 (4th Cir. 1961). Any breach of this duty in connection with a maintained easement would be actionable under the Tort Claim Act. This conclusion was reached in another legal analysis of the problem where it was stated:

> The discretionary function exception could create special problems if the Secretary of Interior were to adopt a particular policy concerning the policing or maintenance of 17(b) easements, and such policy resulted in relatively little enforcement activity. If the Secretary takes the responsibility upon himself to maintain 17(b) easements reserved pursuant to the Settlement Act, the acceptance of this responsibility may place upon him a higher degree of care in the maintenance of the easements than otherwise. For example in United Airlines

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[1] The potential liability of the owner of the servient estate is not at issue here, but it should be noted that the owner is not liable for injuries caused by the condition or non-maintenance of an easement. 28 CJS Easements § 94c.

> Inc. v. Weiner, 355 F.2d 339 (1964), it was held that the government was required to exercise reasonable care in the management of the national monument involved in the case and that this duty arose from the mandate contained in Congressional enactments dealing with the Park Service generally, as well as the creation of the particular monument involved in the case. Such a requirement, however, is not an aspect of the Settlement Act or the common law, and, thus, would be more properly derived from the covenants contained in the patent covering subject lands. If, for example, the Secretary accepts the responsibility of maintaining a footpath to a designated section of public land, the law would require him to manage the easement in a non-negligent manner, including the provision of warnings of dangerous conditions that are either known or susceptible of knowledge by the agents of the government. Hulet, supra [328 F. Supp. 355 (1971)]. If, however, the Secretary ~~decides, as a policy~~ matter, not to maintain or police the easements, he could not be held liable for any injuries occurring thereon.

Legal Memorandum Easement Management, Public Easements Under the Alaska Native Claims Settlement Act, report of the Federal-State Land Use Planning Commission (June, 1978). In order to put the public user on notice of its decision to not maintain a particular easement, it would be appropriate for the BLM to post a sign at the beginning of the easement stating it is not maintained.

In making its decision on whether to maintain a 17(b) easement, the BLM should utilize criteria similar to what it would use if the road or trial was entirely on public domain. Availability of funds and manpower and the degree of use are essential considerations in making such a determination. Moreover, while the use allowed on any particular 17(b) easement cannot be increased, without the consent of the Native corporation owner of the servient estate (see 28 CJS, Easements, § 95b), there is nothing prohibiting the United States from decreasing those uses if it must do so as a result of such factors as lack of Congressional appropriations.

However, as the owner of the easement, the United States has some potential liability even if it does not exercise its discretion to maintain the easement. Under the applicable state law:

> A landowner or owner of other property must act as a reasonable person in maintaining his property in

> a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden on the respective parties of avoiding the risk.

Webb v. City & Borough of Sitka, 561 P.2d 731, 733 (Alaska, 1977). As an owner of property, the United States is not "an insurer of its property" and does not have to "endure unreasonable burdens" to keep its property in a safe condition. Id., 734. Knowledge of the dangerous condition and foreseeability of injury are essential elements in determining what reasonable actions are required. See, Id.; and Carlson v. State, supra, 598 P.2d at 975.

We are therefore of the opinion that the United States must take reasonable steps to protect the public users of 17(b) easements from known hazards. See, Hulet v. United States, 328 F. Supp. 335, 337 (D. Idaho 1971); and Carlson v. State, supra, 598 P.2d at 974. This reponsibility also includes conditions the United States should have known about. McGarrey v. United States, 370 F. Supp. 525, 547-548 (D. Nev. 1973). We do not believe this requires inspection of every 17(b) easement but it certainly includes what is known by federal employees, is public knowledge or has been communicated to the government by outside sources.

Since the BLM is well aware of the extremely hazardous condition of a portion of the Jackalof-Windy Bay easement, we are of the opinion that that portion of the road must either be closed to vehicles or the bridges, as well as any other known dangerous condition, repaired. If repair of the road is undertaken, it must be conducted with reasonable care (see cases cited above). If the road is blocked, the road block must also be constructed and marked in a reasonable manner. As said in Hernandez v. United States, 112 F. Supp. 369, 371 (D. Hawaii, 1953):

> It may be assumed arguendo that the erection of a road block is a discretionary function. However, after having exercised its discretion to erect the road block, the Government had the absolute duty to properly and adequately warn passers along the road of the hazard created. There is certainly no discretion not to warn the foreseeable motoring public of the danger ahead.

Id.

Posting the road, rather than blocking or repairing it, would tend to reduce potential liability. Given the extreme

danger, though, and the fact that the ordinary user probably would not fully understand the risk, posting alone would probably not eliminate liability. If posting is the action BLM ~~decides~~ to take, highly visible signs would have to be placed at the beginning of the dangerous portion of the road, at reasonable intervals along the road and on both sides of each bridge. Hulet v. United States, 328 F. Supp. at 337-338 ("...it would have been more consonant with due care for the Park Service to have posted additional signs with more specific warning at those areas of greater risk.")

III

CAN THE EASEMENT BE TRANSFERRED TO THE STATE WITH OR WITHOUT ITS CONCURRENCE?

While section 17(b) requires reservation of public easements by the United States, it does not provide authority for their transfer. Thus, even though the Secretary of the Interior ~~has broad plenary~~ powers in dealing with public lands, it is arguable that a complete transfer of a 17(b) easement would prevent the United States from guaranteeing the public access it has been statutorily charged with reserving. See, Legal Memorandum Easement Management, Public Easements Under the Alaska Native Claims Settlement Act, supra, at 166-167. In any case, under the current 17(b) regulations any transfer of ownership of the easement has been precluded by the regulation providing for continual oversight of the easements and termination of such easements when their reservation is no longer necessary. 43 CFR § 2650.4-7(a)(13). This regulation also has the effect of precluding public dedication of a 17(b) easement since the ability to terminate an easement is entirely inconsistent with a public dedication. See, Memorandum to Director, BLM, from Associate Solicitor, Division of Public Lands (August 5, 1957) (no legal authority to terminate a publically dedicated easement); and Memorandum to Director, BLM, from Acting Assistant Solicitor, Branch of Land Management (May 9, 1955) (the United States has no control or authority of an easement after its public dedication).

A transfer of easement administration would, however, be proper. This could be implemented by a cooperative agreement under section 307 of the Federal Land Policy and Management Act (43 U.S.C. § 1737). A transfer of easement administrative authority to the State of Alaska, or a local governing body, would be especially appropriate in those situations where the 17(b) easement was reserved at the request of that non-federal entity and benefits it more than the federal government. Such a transfer seems to have long

been contemplated by the Department. For instance, in testimony before the House of Representatives, then Assistant Secretary for Lands and Water Resources, Guy Martin, stated:

> Adminstration of other easements may be transferred [from the BLM] to the federal or State agency receiving the most benefit from the easement. Therefore, it is expected that the BLM will ultimately administer about one-third of the total number of easements reserved.

Testimony of Guy Martin, House Subcommitee on General Oversight and Alaska Lands, September 12, 1977.

Administration of a 17(b) easement cannot, however, be transferred to a non-consenting party. Such an attempt would simply be ineffectual. Thus, the State of Alaska could not be forced to accept transfer of the administration of a 17(b) easement. Conversely, the State of Alaska cannot force the United States to exercise its discretion to maintain the easement ~~and if it wanted~~ it maintained it would have to accept easement management responsibilities.

Similarly, the transfer could not properly take place if it would increase the burden on the servient estate, unless the Native corporation owning the land consented. See, 28 CJS Easements, § 95b; see also, Restatement of Property §§ 489-492. Moreover, since section 2(b) of ANCSA requires the "maximum participation by Natives in decisions affecting their rights and property," the concurrence of the Native corporation owning the servient estate would be in order. At the very least, the land-owning corporation would have to be consulted and their comments given considerable weight.

Still, a transfer of easement administration would not have the effect of completely eliminating all potential liability of the United States. The transferee, and not the United States, would be liable for its own negligent acts and its negligence could not be imputed to the United States. McGarrey v. United States, supra, 370 F. Supp. at 531. The United States would, nevertheless, have some potential liability for negligent inspection or supervision where the possible danger is so extreme that it would be a breach of its standard of due care to not adequately inspect and supervise. Id. 547-548. This requires a separate analysis for each easement and is a matter which can be addressed in the cooperative agreement transfering administration of the easement.

IV

CAN THE JACKALOF-WINDY BAY ROAD BE CONSIDERED A STATE-OWNED PUBLIC ROAD WHICH IS A VALID EASEMENT EVEN WITHOUT A 17(b) RESERVATION?

If the State of Alaska asserted an ownership claim to the Jackalof-Windy Bay road and it could be shown the State had a legal claim to the road, current BLM policy would allow for the termination of the easement.[2/] As pointed out in part I of this memorandum, part of the road is a valid State road and the 17(b) reservation of that portion can be terminated. We are not, however, aware of any assertion by the State that it owns the portion of the easement containing the failing log bridges. Since the road appears to still meet the current 17(b) criteria, we do not believe the remaining portion of the Jackalof-Windy Bay easement can be terminated simply because it was built pursuant to a State logging contract while the land was still tentatively approved for conveyance to the State of Alaska.

CONCLUSION

We thus conclude that the portion of the Jackalof-Windy Bay road containing the eleven failing log bridges appears to still meet the current criteria for a 17(b) easement. As the owner of the easement, the United States is potentially liable for injuries or losses incurred as a result of the known hazards of that road. It is, therefore, our opinion that the road should either be blocked to vehicle traffic or repaired. Whatever course of action the BLM chooses must be carried out with reasonable due care. Administration of the easement could be transferred to the State of Alaska, or another entity, if it agreed and if the owner of the servient estate was consulted and concurred in the event that the

2/ In the Appeal of State of Alaska, ANCAB VLS 80-51, the issue of whether a 17(b) easement can properly be placed on a road the State claims is an RS 2477 road is being litigated. The BLM has taken the position in that appeal that, since it is prohibited from adjudicating RS 2477 claims, it must reserve the road if it meets the criteria of section 17(b) and the implementing regulations. Resolution of this appeal could cause a shift in the BLM's current position and may also affect the advice we have rendered in part IV of this memorandum.

transfer increased the burden on that estate. On the facts available to us, we cannot say that the road would be a viable easement absent the 17(b) reservation.

Dennis J. Hopewell

United States Department of the Interior

OFFICE OF THE SOLICITOR
ALASKA REGION

701 C Street, Box 34
Anchorage, Alaska 99513

IN REPLY REFER TO:

BLM.AK.239

June 1, 1984

MEMORANDUM

TO: Deputy State Director, Div. of Conveyances, Alaska State Office, BLM (960)

ATTN: Chief, Branch of Easements (963)

FROM: Dennis J. Hopewell, Deputy Regional Solicitor, Alaska Region

SUBJECT: State of Alaska, 81 IBLA 7 (IBLA 84-132)

You have already received and reviewed the attached decision in State of Alaska, 81 IBLA 7 (1984). This memorandum is intended to provide further advice on BLM's obligations and the meaning of the decision.

No legal or policy position of the BLM was struck down by the IBLA decision. Rather, the Board found that the administrative record was insufficient to show a rational basis for either the reservation or rejection of the additional site easements proposed by the State of Alaska. As a result, the Board ordered:

1. The BLM to investigate the information presented by the State; and

2. If the information justified retention of an additional site easement (or easements), the BLM is to issue an amended decision reserving the easement(s) with appropriate written justification for the decision; or

3. If the BLM determines that reservation of an additional easement (or easements) is not reasonably necessary, it shall issue a written determination to that effect.

Those instructions are not as clear as they could be. We interpret these obligations as follows:

1. BLM is to investigate and consider all relevant aspects of access needs through the conveyance area specifically including the alleged slow flow of the water through the area and the slowing effect of wind and tidal influence; and

2. If the BLM decides an additional site easement (or easements) is reasonably necessary, an amended decision is to be issued following documentation of the case file and a new analysis of the evidence must be set out either in the decision or in an amended State Director's final easement memorandum; or

3. If BLM determines a State proposed easement (or easements) is unnecessary, after documentation of the case file, a written notice or decision should be issued setting forth the BLM's analysis of the relevant evidence. This would be an adverse action which the State could appeal. The State Director's final easement memorandum can also be modified if BLM desires.

In addition to these specific instructions, the IBLA made some comments in footnote 8, at 81 IBLA 12, which need explanation. In no instance is the BLM ever to "disregard" a Native corporation's arguments. Such disregard would be a clear and unjustifiable violation of ANCSA. To the extent the footnote infers the BLM can disregard Native comments, the footnote is in error. However, the footnote is probably intended to say that BLM must reject any argument that site easements may not be reserved to accommodate access to recreational areas or waters. While site easements cannot themselves be reserved for recreational purposes, 43 CFR 2650.4-7(b)(3), they can certainly be reserved to accommodate transportation to and from State waterways used for recreational purposes. 43 U.S.C. 1616(b)(1); and Alaska Public Easement Defense Fund v. Andrus, 435 F. Supp. 664, 677, 678 (D. Alas. 1977). Thus, the footnote should be read to say that any argument that site easements cannot be reserved to provide access to State waterways for use of those waterways for recreation can be rejected by BLM.

Footnote 8's statement that trespass problems should be left for future easement management regulations is also too bald of an assertion. It is true that such considerations go beyond the easement reservation criteria which are based on reasonable necessity. However, littering, tree cutting and other destructive actions exceed the authorized uses of the site reservations and can be regulated, controlled and enforced by the BLM. However, the BLM would not have jurisdiction to take enforcement

actions against trespasses and destructive actions taking place along the State's waterway on Native lands where no reservation was made to the United States.

One last note, in investigating and determining the State's proposed easement reservations, threats of appeals by interested parties should be given no weight. Whatever decision the BLM makes, it is extremely likely that either the Native corporation or the State will appeal.

Please do not hesitate to contact us for any further assistance you may need in this matter.

Enclosure:
State of Alaska, 81 IBLA 7 (1984)

IN REPLY REFER TO:

29

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF LAND APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22203

STATE OF ALASKA

IBLA 84-132 Decided May 14, 1984

Appeal from decision of the Alaska State Office, Bureau of Land Management, approving the conveyance of certain lands to Kuitsarak, Inc., without reservation of two site easements requested by the State of Alaska pursuant to section 17(b) of the Alaska Native Claims Settlement Act.

Set aside and remanded.

1. Alaska Native Claims Settlement Act: Easements: Generally

   If BLM determines that a waterway through land to be conveyed pursuant to the Alaska Native Claims Settlement Act is a "major waterway," as defined in 43 CFR 2650.0-5(o), BLM must reserve in the land conveyance such public easements at periodic points along the waterway as are reasonably necessary to facilitate proper public use of the waterway after the conveyance.

2. Alaska Native Claims Settlement Act: Easements: Review

   When the record of BLM's final decision concerning the reservation of public easements in the conveyance of land pursuant to the Alaska Native Claims Settlement Act does not reveal any explanation of BLM's determination not to include the reservation of particular easements timely recommended by the State of Alaska, the Board will set aside the decision and require BLM to consider the State's recommendations and provide a written explanation of its decision in response to the recommendations.

APPEARANCES: M. Francis Neville, Esq., Assistant Attorney General, State of Alaska, for the State of Alaska.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

The State of Alaska has appealed the September 29, 1983, decision of the Alaska State Office, Bureau of Land Management (BLM), approving the interim conveyance of certain lands to Kuitsarak, Inc., a Native village

corporation, pursuant to the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. §§ 1601-1628 (1976 and Supp. V 1981). The State disagrees with BLM's conveyance decision which did not include the reservation of two public easements requested by the State pursuant to the provisions of section 17(b) of ANCSA, 43 U.S.C. § 1616(b) (1976), and the Department's regulations at 43 CFR 2650.4-7. 1/

Section 17(b)(3) of ANCSA provides for the Department's reservation of public easements on lands patented to Native village and regional corporations. In exercising this authority, BLM is to consider whether a proposed easement is "reasonably necessary to guarantee international treaty obligations, a full right of public use and access for recreation, hunting, transportation, utilities, docks, [or] such other public uses as the [Land Use] Planning Commission [or the Department] determines to be important." Alaska Public Easement Defense Fund v. Andrus, 435 F. Supp. 664 (D. Alaska 1977). 2/ Prior to arriving at its final determination of the public easements to be reserved in a particular conveyance, BLM is to consider recommendations by the State submitted within 90 days after notice by BLM requesting such recommendations. 43 CFR 2650.4-7(a)(10) and (11).

It appears from the record that BLM's evaluation of the Native selections by Kuitsarak, Inc., began in 1974 when that corporation filed selection application F-14862-A. On March 25, 1977, BLM notified the State Commissioner, Department of Highways, of the easements proposed to be reserved in the conveyance of lands to the Native corporation, and directed the State to file its comments with the Land Use Planning Commission (LUPC). On the same date BLM also notified the LUPC of the proposed public easements and directed the LUPC to respond within 90 days. Included among the proposed easements identified by BLM were 25-foot streamside easements along the banks of the Goodnews River and the Middle Fork of the Goodnews River (EIN 13 D1, L; and EIN 15 D1, L).

In response to BLM's notice, the State informed the LUPC that it had no comments on the proposed easements. On June 17, 1977, the LUPC responded to BLM expressing, inter alia, its agreement with the proposed streamside easements. On April 4, 1978, the BLM State Director issued an internal memorandum

1/ Following the filing of the appeal, the State and BLM stipulated to a partial settlement of the appeal, and by its order of Dec. 13, 1983, the Board approved their agreement. Remaining for consideration by the Board are the issues raised by the State concerning the lands to be conveyed to Kuitsarak, Inc., under BLM's Sept. 29, 1983, decision, located in secs. 29 and 32, T. 11 S., R. 72 W., and secs. 3 and 9, T. 12 S., R. 72 W., Seward meridian. BLM did not respond to the State's statement of reasons in this regard.

2/ In this decision the district court held, among other things, that the Secretary must adhere to the quoted criteria prescribed for the Land Use Planning Commission in section 17(b)(1) of ANCSA, 43 U.S.C. § 1616(b)(1) (1976 and Supp. V 1981), when reserving public easements pursuant to section 17(b).

expressing his final decision concerning public easements to be reserved in the conveyance to Kuitsarak, Inc. The decision indicated the State Director's approval of the reservation of the two streamside easements.

Sometime in 1978 BLM suspended action on the Kuitsarak, Inc., selection application, presumably to await the Department's revision of its public easement regulations in accordance with the district court's decision in Alaska Public Easement Defense Fund v. Andrus, supra. 3/ The next pertinent document in the record is a BLM memorandum dated December 21, 1979, which presented new easement recommendations to the BLM State Director with the explanation that the recommendations were based on the new regulations. This document indicates that BLM reconsidered and rejected the proposed streamside easements along the Goodnews River and the Middle Fork of the Goodnews River. The basis for the rejection of each of these easements was stated to be: "The easement does not meet the requirements of the new easement regulations. It is recreational in nature." 4/

On July 29, 1982, the BLM State Director notified the State of the revised, proposed public easement recommendations and requested that the State provide its comments within 20 days so that BLM could consider them prior to meeting with the affected Native corporations. BLM's memorandum expressed the determination that the Goodnews River is navigable but that the streamside easements proposed to be reserved along the banks of the Goodnews River and the Middle Fork of the Goodnews River (EIN 13 D1, L; EIN 15 D1, L) were contrary to the Department's regulations. The memorandum did, however, express BLM's tentative approval of the reservation of two 1-acre site easements along the Goodnews River. One of these proposed easements (EIN 8 C4, C6) was located on an island in the Goodnews River in the SW 1/4 sec. 18 and the NW 1/4 sec. 19, T. 12 S., R. 72 W., Seward meridian; the other easement (EIN 11 C5) was located "upland of the ordinary high water mark on the left bank of the Goodnews River between two unnamed streams in NE 1/4 Sec. 2, T. 11 S., R. 72 W., Seward Meridian." BLM described both site easements as "necessary to facilitate public travel along the Goodnews River."

The record does not contain any written response by the State to BLM's request for comments; however, it does reveal that a representative of the State attended a meeting to discuss BLM's tentative easement decisions, held at the village of Goodnews Bay on October 5, 1982, and proposed the reservation of additional site easements along the Goodnews River and the Middle Fork of the Goodnews River during this meeting.

On October 26, 1982, the State provided BLM with a summary of "additional evidence to support reservation of a reasonable pattern of 17(b) easements to be reserved on lands to be conveyed to Kuitsarak, Inc., at the

3/ The Department published revised regulations in response to the district court's decision on Nov. 27, 1978, at 43 FR 55326 (codified at 43 CFR 2650.4-7).

4/ This conclusion follows from the district court's decision in Alaska Public Easement Defense Fund, supra at 677-78, and the resulting provisions of 43 CFR 2650.4-7(b).

village of Goodnews Bay." 5/ Included in the letter was the following information, obtained from Mr. Ron Hyde, owner of Alaska River Safaris and a long-time guide on the Goodnews River:

> 1) Alaska River Safaris averages 80 river floaters on the Goodnews River per season and approximately 100 other guests by power boat.
>
> 2) There are approximately 50 to 60 other floaters on the river during the summer.
>
> 3) During the peak of the season as many as 35 people may be on the river at the same time.
>
> 4) The trip through the conveyance area takes two to four days, depending on the weather conditions. At times floaters can be traveling into a 35 mph headwind in heavy rain.
>
> 5) Floating parties on the river average four stops per day.

In its letter the State also acknowledged Native corporation objections to the proposed site easements based on past littering, tree cutting, and interference with Native fish camps by recreational users of the river.

The Calista Corporation, the Native regional corporation affected by the Kuitsarak, Inc., land selections, also wrote to BLM on October 26, 1982. In its letter the regional corporation reported opposition by Kuitsarak, Inc., to the additional site easements proposed by the State and suggested that Mr. Hyde could obtain a "temporary permit" from the village corporation when conducting rafting trips on the Goodnews River. On October 29, 1982, the Calista Corporation again wrote to BLM, responding particularly to the State's October 26 letter. In this letter the regional corporation described the proposed site easements as recreational in nature, and thus not authorized under the Department's regulations, and further suggested that if recreational users of the Goodnews River were interested in the easement decisions they should have participated in the village land conveyance meeting because the State is "totally inept to propose easements utilized by specific user groups on corporate lands."

There is no direct response by BLM to the State's proposal for additional site easements indicated in the record. An internal BLM memorandum, dated October 18, 1982, discusses the October 5 meeting at the village of Goodnews Bay, and includes the information that the Native village corporation board did not object to the reservation of the site easement identified as EIN 11 C5, but did object to the site easement identified as EIN 8 C4, C6, in part because past river travelers had cut trees and left litter along the

---

5/ In its letter the State referred to an enclosed map on which suggested locations for the easements were noted. The map is not included in the record..

river. There is, however, no reference in this memorandum to the additional site easements proposed for reservation by the State.

An internal memorandum dated March 3, 1983, indicates BLM's final decision regarding the navigability of water bodies within the lands selected by Kuitsarak, Inc., including the determinations that the Goodnews River and the Middle Fork of the Goodnews River are navigable waterways. An internal memorandum dated June 22, 1983, indicates BLM's final decision regarding proposed easements and its determination that the Goodnews River and the Middle Fork of the Goodnews River are major waterways. The easements approved in this memorandum are the same as those reserved in BLM's September 29, 1983, decision approving the interim conveyance of lands to Kuitsarak, Inc. Neither document contains any reference to the State's proposal for additional site easements.

In support of its appeal the State argues that the record does not show a rational basis for BLM's denial of the State's request for additional easements, and that reservation of the additional easements requested by the State is necessary to facilitate reasonable public use of the Goodnews River and the Middle Fork of the Goodnews River. As is explained below, the Board has concluded that BLM did not adequately justify its decision not to reserve the additional easements requested by the State and, therefore, remands the case to BLM for further consideration of the State's requests.

[1] Under BLM's determination that the Goodnews River and the Middle Fork of the Goodnews River are "major waterways," made pursuant to 43 CFR 2650.0-5(o), it is incumbent upon BLM to reserve such public easements "at periodic points" along these waterways as are reasonably necessary to facilitate public use of the waterways. See Alaska Public Easement Defense Fund, supra at 675-76, 677-78; 43 U.S.C. § 1616(b)(1) (1976); 43 CFR 2650.4-7(a)(1) and (b)(3). As the district court stated in Alaska Public Easement Defense Fund at page 677, the statutory authority for the reservation of such easements is "in recognition of the fact that there would be valid public uses of the State's water, even when surrounded by land withdrawn pursuant to the ANCSA," and "[t]he purpose of the easements along waterways is to provide a place for docks, campsites, and such facilities to service those who are properly using the public water."

[2] It may be BLM's opinion that reservation of the additional easements urged by the State in this case is not necessary to reasonably facilitate public use of the Goodnews River and the Middle Fork of the Goodnews River. We will not attribute this position to BLM, however, for it is not apparent from the record before us that BLM gave any serious consideration to the State's proposals prior to its approval of the interim conveyance of lands to Kuitsarak, Inc., and BLM did not appear in the appeal to offer any explanation for not reserving the requested easements in the conveyance.

The State has presented information to BLM supporting its proposal for additional site easements along the Goodnews River to facilitate public use of that waterway. See Letter of October 26, 1982, from James E. Culbertson, Natural Resource Officer, Alaska Department of Natural Resources, to Robert

Arnold, Assistant to the State Director for Conveyance Management (BLM). The thrust of this information is that the distances between the site easements approved by BLM on the Goodnews River (EIN 8 C4, C6; EIN 11 C5), considered with remaining access to or from the waterway across nonselected, Federal lands, are too great to facilitate convenient public use of the waterway. Inasmuch as this information relates to proposals offered by the State at least as early as the October 5, 1982, meeting at the village of Goodnews Bay, it appears that BLM was obliged to consider the State's recommendations in accordance with the provisions of 43 CFR 2650.7(a)(10) and (11). 6/

Because the record does not reveal a rational basis for either nonconsideration or rejection of the State's proposals, the Board directs that BLM shall investigate the information presented by the State to determine its accuracy, and if the results of such investigation confirm the asserted need for additional easements, BLM shall amend its September 29 conveyance decision to provide for the reservation of such easements with appropriate written justification. See State of Alaska, 79 IBLA 335 (1984); United States Fish & Wildlife Service, 72 IBLA 218 (1983). 7/ If BLM determines that an additional easement recommended by the State is not reasonably necessary, it shall support its determination with a written explanation. State of Alaska, supra. 8/

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the portion of BLM's September 29, 1983, decision approving interim conveyance of lands to

6/ BLM notified the State of its tentative, final easement determinations in a memorandum dated July 22, 1982. Although BLM requested that the State respond within 20 days, the regulations provide that the State "shall be afforded 90 days after notice by the Director to make recommendations with respect to the inclusion of public easements in any conveyance." 43 CFR 2650.4-7(a)(10). In any event, BLM has not suggested that it considered the State's proposals to be untimely.

7/ The additional evidence presented by the State in its October 26, 1982, communication to BLM apparently did not concern past use of the Middle Fork of the Goodnews River. Nonetheless, in conducting its investigation as directed in this decision, BLM should consider whether uses of that "major waterway" support the reservation of an additional easement as asserted by the State.

8/ In this process BLM shall disregard the Native corporation arguments previously raised in opposition to the proposed easements. Their assertion that the proposed easements would not be lawful because they are recreational in nature is contrary to the statutory authority to reserve easements to facilitate proper use, including recreational use, of State waterways. Their suggestion that the State cannot properly represent the interests of its citizens in the easement decision process ignores the clear mandates of the statute and regulations that the State be consulted on behalf of its citizens. Their concern over past littering, tree cutting, and other destructive actions by users of the waterways through the selected lands is properly addressed by regulations governing use of easements, rather than by denial of public easements.

Kuitsarak, Inc., and appealed by the State of Alaska is set aside and the case is remanded to BLM for further action consistent with the Board's opinion.

R. W. Mullen
Administrative Judge

We concur:

Wm. Philip Horton
Chief Administrative Judge

Franklin D. Arness
Administrative Judge

United States Department of the Interior

OFFICE OF THE SOLICITOR
ALASKA REGION

701 C Street, Box 34
Anchorage, Alaska 99513

FILE COPY

IN REPLY REFER TO:

[BLM.AK.595]
9230 (940)

January 24, 1986

MEMORANDUM

TO: Deputy State Director for Operations
Alaska State Office
Bureau of Land Management

FROM: Deputy Regional Solicitor
Alaska Region

SUBJECT: Use of Citation Authority on
ANCSA 17(b) Easements

You have asked for further legal advice concerning management of public easements reserved to the United States pursuant to section 17(b) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1616(b). You are particularly interested in the possible use of criminal sanctions in managing 17(b) easements.

Public easements reserved under ANCSA constitute an "interest in land" within the meaning of section 103(e) of the Federal Land Management and Policy Act (FLPMA), 43 U.S.C. § 1702(e). As discussed in our previous legal opinion of March 17, 1980, copy attached, an easement is the right to use someone else's land for specific purposes and, as such, is a non-possessory interest in land. While it is not a possessory interest, it is nevertheless an "interest in land." This view was announced to the public by a BLM notice dated August 27, 1979 and is articulated in published departmental procedures concerning 17(b) easements at 601 D.M. 4.3H ("An easement is a property interest..."). Therefore, the provisions of FLPMA are available for use in managing 17(b) easements.

Current surface protection regulations, such as those set out as parts 8300 and 8360 of 43 CFR, are not, however, either fully applicable or fully adequate. In specific, the portions of the current surface management regulations requiring closure orders prior to enforcement cannot be applied to 17(b) easements since the BLM's land interest is less than a total surface interest. See, attached legal opinion of March 17, 1980. To illustrate this point, a 17(b) easement may be reserved for foot traffic only but the landowner may properly allow off-

road vehicle use to the extent it does not interfere with the United States' reserved interest. More general provisions, such as those set out at 43 CFR § 8341.1(f)(1)-(5), can be used in managing 17(b) easements. However, new regulations would be needed if broader criminal sanctions were desired. One possibility is a regulation providing for criminal citations against anyone engaging in activity which interferes with the reserved uses.

Along this line, the extent of the United States' retained interest in the land is too small to permit civil or criminal action against uses which do not interfere with the reserved public use rights. While we have previously advised BLM that it can block/close an easement where manpower or funding limitations prevent maintenance of the easement in reasonably safe condition,[1] the attached legal opinion of March 17, 1980 discusses in detail the United States' inability to take action against uses which only injure the landowner's rights and do not infringe on the public use rights retained by the United States. Due to the inherent limitations of the United States' reserved interests in 17(b) easements, ~~the only remedy~~ we see for threatened, prospective injuries to a 17(b) easement is a civil injunction.

Dennis J. Hopewell

Dennis J. Hopewell

Attachment: Copy of Legal Opinion of March 17, 1980

cc: BLM, DSD, Resources (930)
BLM, DSD, Conveyances (960)
BLM, Paralegal (960)

1/ Legal opinion of May 11, 1981 concerning Jackalof-Windy Bay ANCSA Easement, EIN 1 D9 (016).

United States Department of the Interior
OFFICE OF THE SOLICITOR
ALASKA REGION
701 C Street, Box 34
Anchorage, Alaska 99513

IN REPLY REFER TO:

BLM.AK.0718

(2650.4) (013)

February 4, 1987

MEMORANDUM

TO: State Director
Alaska State Office
Bureau of Land Management

FROM: ~~Deputy Regional Solicitor~~
Alaska Region

SUBJECT: Management of ANCSA 17(b) Easements

You have asked for a legal opinion on numerous questions involving management of ANCSA 17(b) easements.[1] Since you request our view on certain statements and articulated assumptions, we will reiterate parts of your request and present our response in the same order and format as your request.

1. EASEMENT LOCATION ADJUSTMENTS

You have presented for our consideration, the following background information and assumptions:

> Easements have been reserved based on both a legal description and a map depiction. The legal description is given as within a section for a site easement or starting and ending within a section for a linear easement. [The basic map depictions are fairly wide linear markings running

1/ ANCSA 17(b) easements are those easements reserved for public access across lands conveyed to Native corporations pursuant to uncodified section 17(b) of the Alaska Native Claims Settlement Act (ANCSA), Pub.L. 92-203 (85 Stat. 688), codified in part at 43 U.S.C. § 1601 et seq.

from one designated section of land to another for linear easements and a fairly large triangular marking in an identified section of land for site easements]. Some locations are given more specificity, i.e., left/right bank, mouth of stream.

a. When there is agreement between the managing agency and the land owner concerning the on-the-ground location of an easement, it is our assumption that as long as the written site location or start and end points for a linear easement remain within those sections or in the vicinity of the referenced topographical feature, then any variance from the map depiction for the actual on-the-ground location can be handled through a Memorandum of Understanding (MOU) which does not need to be recorded.

b. It is our assumption that if the on-the-ground location changes the legal description to another section, then a recordable document is required. Can this still be a Memorandum of Understanding, or must there be a donation and release of interest? Can the conveyance document be corrected using the authority of Section 316 of FLPMA?

c. If an MOU is not sufficient, it is assumed that the procedures to be used include all the various authorities the agencies possess to make the appropriate action, i.e., ANCSA exchange authority, acceptance of gifts, acquisition, etc.

Our legal analysis of your assumptions is as follows:[2]

2/ What is said in this portion of our opinion reflects the current state of relevant general legal concepts and does not preclude or predict specific ANCSA conformance procedures which may be developed to address these problems and to provide specific remedies. Thus, this opinion should be read in the light of, and be considered modified by, any specific ANCSA conformance procedures which may be implemented at some future date.

a. On-the-ground location by mutual agreement.

When parties agree to the reservation of an easement based on a legal description and map depiction there is some flexibility in adjusting the easement to conform to the on-the-ground location. Such a general easement reservation reserves the right "to a convenient, reasonable, and accessible way within the limits of the grant."[3] "... the location must be reasonable as respects the rights of the grantor as well as the grantee."[4] By the terms of ANCSA, however, the legal description and map depiction must be viewed as giving a degree of certainty.[5] With these principles in mind, it is appropriate to take such things as topography into consideration when fixing the on-the-ground location of the reserved easement. Where, however, there is an existing route or site, that route or site will be taken to be the location of the easement unless a contrary intention appears in the conveyance documents.[6] In the absence of either an existing easement or definite legal location, the parties can agree to the on-the-ground location as long as that location is reasonably compatible with the terms and descriptions contained in the conveyance documents. In addition, slight and immaterial alterations are also possible where the burden on the servient estate[7] is not increased.[8]

3/ 28 CJS Easements, § 80, p. 760. Citations to such general sources as CJS, rather then strict reliance on case citations, are used in this opinion due to the general nature of the issues.

4/ Id.

5/ 43 CFR § 2650.4-7(a)(4) specifically provides that "[a]ll public easements which are reserved shall be specific as to use, location, and size." (Emphasis added).

6/ 28 CJS Easements, § 80b, p. 761.

7/ The servient estate is the land conveyed to the ANCSA corporation which is subject to, or "required to serve," the easement.

8/ Gaither v. Gaither, 332 P.2d 436, 438 (Ca. 1958); and 28 CJS Easements, § 65C, p. 733.

Coupling this general law with how 17(b) easements are reserved by general legal descriptions and fairly wide markings on a map, we agree that the location of an easement can be conformed to the on-the-ground location as long as its location is within the bounds set by the conveyance documents. For linear easements this requires that beginning and ending points remain in the same sections and that the easement itself stays within the general course depicted on the easement map. By this we mean that if a linear easement is depicted as crossing Native corporation land on the west side of a mountain, the location may be fixed on the most reasonable route on the western side of the mountain but may not be moved one or more sections to an entirely different location. For site easements, the on-the-ground location must also be within the section identified in the conveyance documents and must correlate to the topography depicted on the map (e.g. at a mouth of a stream). In other words, the easement location must be in reasonable proximity to and recognizable as the 17(b) easement described and depicted in the pertinent ANCSA conveyance document. We do not, however, agree that the flexibility to make adjustments is so broad as to include "any variance" agreed to by the managing agency and the landowner.

In the event an agreement is reached on the appropriate on-the-ground location, a MOU is one acceptable mode of memorializing the agreement. In order for such agreements to have independent legal affect, they must be based on adequate legal authority. Such authority for BLM is provided by section 307 of the Federal Land Policy and Management Act (FLPMA).[9] An MOU is not a title document and you correctly state it would not generally need to be recorded.[10] Alternatively, the location of a 17(b) easement can simply be fixed on-the-ground without any need for a written agreement.

b. and c. Changes requiring more than just mutual agreement.

In the event the affected parties are in agreement as to the on-the-ground location but the agreed upon location varies too greatly from the reserved easement, more than a MOU

9/ 43 U.S.C. § 1737.

10/ Note, however, that for certain situations 601 DM 4.3G provides, "[s]uch adjustments shall be reduced to writing and recorded."

is needed. If the linear or site easement moves sections or varies significantly in topography from the easement described in the conveyance documents, then it is a title matter and recordable title instruments are required.[11] In general, this would entail a conveyance (often called a "donation") for the new route from the affected ANCSA corporation and a release of the originally reserved easement by the United States. The procedures discussed in BLM's Title Recovery Handbook, IM No. AK-85-271, are the ones to use in processing conveyances of any type to the United States. While section 316 of FLPMA[12] provides statutory authority for BLM's correction of the original conveyance document, such action cannot be taken without the current landowner's consent and cooperation, and the implementing regulations[13] have made such deed corrections a relatively standard title acquisition procedure. In acquiring new easements any authority otherwise available to the managing federal agency can be used, although it is BLM which must actually issue any release terminating a reserved 17(b) easement.[14] The way we foresee this working is for the managing agency to arrange for the acquisition of a new route by purchase, donation, or exchange with the understanding that BLM will take the appropriate steps to terminate the existing easement.

d. Adjustments of location where there is no mutual agreement.

You have also asked for legal guidance on what to do in the event the managing agency and the landowner cannot agree on an appropriate location of a 17(b) easement. While we assume you are concerned with the easements requiring the type of major adjustments discussed in part b and c above, it should be noted that the federal government has the right to locate a reasonable route of access within the perimeters of the description contained in the conveyance documents even if the landowner withholds its assent. To avoid problems it is of course always preferable to obtain the servient landowner's

11/ In this regard, it needs to be reiterated that any specific ANCSA patent conformance procedures developed in the future may modify the more general law set out here.

12/ 43 U.S.C. § 1746.

13/ Subpart 1865 of 43 CFR.

14/ See, 601 DM 4.4C; and 43 CFR § 2650.4-7(a)(13).

consent. Consultation with the servient landowner(s) is required in every instance by 601 DM 4.3F. Where a reasonable route cannot be established within the bounds of the original 17(b) reservation and the current landowner will not participate in an exchange or donation, the new easement must be acquired by purchase. The purchase would be for the fair market value of the easement and could be condemned in the event the landowner would not agree to a voluntary sale. However, if the 17(b) easement to be acquired is within the boundaries of a conservation system unit, the provisions of section 1302 of the Alaska National Interest Lands Conservation Act (ANILCA)[15] would also have to be followed.

Acquisition by purchase of a new route is in keeping with the well established principle that once the location of an easement is fixed by description or use, any significant modification of the route constitutes a different easement.[16] This is true no matter how convenient or reasonable the new route might be.[17] Moreover, Congress has expressly recognized this general rule by requiring the acquisition by purchase or exchange of any required easement which was not reserved at the time of conveyance.[18]

Along this line, we perceive no basis for deducting the value of the original 17(b) easement from the fair market value of any future easement acquired by voluntary sale or condemnation. This is because section 903(b) of ANILCA does not provide for such a remedy and, more specifically , because 43 CFR § 2650.4-7(a)(13) sets out a particular course of action in the event a 17(b) easement is no longer needed. In short, reserved easements which are no longer needed must be terminated, and the United States has not either reserved or been given the authority to deduct the value of the no longer needed easement from any future acquisitions.

15/ 16 U.S.C. § 3192.

16/ See, Public Easements Under the Alaska Native Claims Settlement Act, report of the Federal-State Land Use Planning Commission (June 1978), p. 169; and 28 CJS Easements, § 84, p. 763.

17/ Id.

18/ Section 903(b) of ANILCA, 43 U.S.C. § 1633.

2. OWNERSHIP OF ROADS AND TRAILS IN PLACE AT TIME OF CONVEYANCE.

You next report that some landowners are asserting ownership over such permanent improvements as roadbeds and road surfaces under the theory that they acquired all rights, including appurtenances of whatever nature by virtue of the ANCSA conveyance. You ask, "... whether transportation improvements within 17(b) easements are owned by the servient owner or by respective Federal and State owners?"

We find this to be somewhat of a non-issue given general legal principles which prevent the owner of the servient estate from taking any action which interferes with the reserved uses and purposes of the easement.[19] Regardless of the exact level of ownership interests, the United States has a sufficient property interest to insure continued use of the reserved 17(b) easements. If a landowner asserted possession or ownership of a roadbed, road surface, bridge, or any other improvement in a manner which interfered with the continued use of the easement, that interference could be prevented by the United States or an affected party by appropriate judicial action.[20] In the same way, ownership of a road does not in itself shift management responsibilities. If a non-federal entity has a duty to maintain a particular road, that duty continues even if a 17(b) easement for the road is reserved. The United States responsibility in regards to maintaining 17(b) easements is explained in more detail in our opinion of May 11, 1981, attached as Addendum 3 and discussed in section 5 of this memorandum.

As far as actual ownership interests go, we think the answer appears in the very nature of a 17(b) easement itself. As we have repeatedly stated, a 17(b) easement is not a possessory interest; it is a right to use land owned by another. Logically then, any fixtures or permanent improvements not

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19/ Vol. 2, Thompson, Real Property (1961), § 427, pp. 696-699.

20/ Vol. II, American Law of Property, §§ 8.105 and 8.106, pp. 311, 312 (1952); Public Easements Under the Alaska Native Claims Settlement Act, supra (n. 16), pp. 165, 166; and Vol. 3, Powell, Real Property (1979), § 420.

expressly reserved to the government[21] would be part of the bundle of rights conveyed under ANCSA subject to the reserved right to accommodate public access. The rights reserved by a 17(b) easement reservation would normally be the right to use the conveyed land and fixtures possessed by another for specified, limited purposes. This is in keeping with the broader mandate of ANCSA to convey all federal interest except the smallest practical tract used in connection with a federal agency and where that is an easement, only the right to use an easement and not fee ownership should be reserved.[22]

The only precedent we can find directly on point concerns a claim by the United States Forest Service for cost recovery from an ANCSA corporation for a road built on land conveyed to that corporation. The Chief of the Forest Service decided the cost was improperly collected from the ANCSA corporation and ordered reimbursement to the corporation. The decision appears to be based on the following legal advice from the Office of General Counsel, United States Department of Agriculture, in which we fully agree:

> The language of the interim conveyance precludes a claim for reimbursement by the United States. As part of the description of the lands conveyed, the conveyance contains the following language, known as an "habendum:"
>
> > NOW KNOW YE, that there is, therefore, granted by the UNITED STATES OF AMERICA, unto the above named corporation the surface and subsurface estates in the land above-described, TO HAVE AND TO HOLD the said estates with all the rights, privileges, immunities, and appurtenances, of whatsoever nature, thereunto belonging, unto the said corporation, its successors and assigns, forever: . . . Interim Conveyance No. 225, p. 5, (August 17, 1979); (emphasis added).

21/ We understand that in certain instances, such as for some navigational aids, necessary improvements are expressly reserved along with the easement.

22/ Section 3(e) of ANCSA, 43 U.S.C. § 1602(e), and 43 CFR 2655.2(c).

> The purpose of an habendum in a deed is to define the extent of the ownership in the property conveyed. In the conveyance to Sealaska, all appurtenances are granted. An appurtenance includes permanent improvements to the land and in this case would include the road.
>
> The interim conveyance did reserve certain property rights to the United States. In this case, a public easement was reserved in accordance with BLM regulations at 43 CFR 2650.4-7. However, the reservation of an easement is not the same as reserving the actual road. The easement merely reserves a nonpossessory right of passage over lands.[23]

By way of reiteration, while we have concluded that the ownership of the roadbed and surface is with the owner of the servient estate, the ownership aspect does not alter or impede the right to use a 17(b) easement for the purpose(s) it was reserved.

3. TRANSFER OF ADMINISTRATION OF FEDERAL INTERESTS IN RESERVED EASEMENTS.

As regards the administration of 17(b) easements you state and ask:

> Departmental Manual 601 DM 4.2 states that 17(b) easements should be administered by the Interior bureau whose land is accessed by the easement. The Regional Solicitor's Office has previously stated that 17(b) easements are not possessory interests, but that they are an interest in the land (January 24, 1986 Memo from Regional Solicitor to Deputy State Director, Operations, BLM [Addendum 2]).

23/ Unpublished Memorandum dated January 6, 1982 to Chief, Forest Service, from Assistant General Counsel, Natural Resources Division, U.S. Department of Agriculture on the subject of Big Salt Road, Tongass National Forest.

a. Can we assume that "administration" and "interest in the land" are one and the same? Does the administering agency hold all of the retained U.S. interests in the land, or are U.S. Interests retained by BLM, with just the administration of the U.S. interest transferred to the administering agency?

b. The January 24, 1986, Memo referenced above also stated that FLPMA contains provisions for managing 17(b) easements. Is Title V of FLPMA BLM's authority for managing 17(b) easements? If BLM transfers administration of easements to another federal agency, will those agencies manage the easements under the authority of FLPMA, or under the authority of regulations peculiar to those agencies? Easements administered by state, municipal or borough governments will, we presume, be managed under State law.

An interest in land and the administration of a 17(b) easement are not one and the same thing. Under section 17(b) of ANCSA public access easements are reserved to the United States. Such easements, as you have been previously advised, are interests in land. Accordingly, 17(b) easements are an "interest in land owned by the United States" as defined by section 103(e) of FLPMA,[24] and BLM can apply its FLPMA authority in managing 17(b) easements. This includes all applicable provisions of FLPMA, like section 307 which authorizes cooperative agreements, and not just the Title V right-of-way provisions. Keep in mind, however, that only limited interests have been reserved in 17(b) easements, and management can neither increase the burden on the servient estate nor interfere with the guarantee of reasonable public access.

Since the interest in land is held by the United States, it is only the administration of a 17(b) easement, and not the ownership of it, which transfers between managing agencies. Accordingly, the management directives and authorizations contained in FLPMA stay with the BLM and do not pass to another agency along with the administrative role. Rather, each managing agency, be it a federal, state, or local entity, would use its normal management authorities with the caveat

24/ 43 U.S.C. § 1702(e).

expressed above that the burden on the servient estate cannot be increased and the public access rights cannot be unreasonably restricted. The question as far as Interior agencies are concerned is expressly answered by 601 DM 4.2 wherein it is provided that where an "easement accesses or is part of the access to a conservation system unit, that easement shall become part of that unit and be administered accordingly."[25] While management of transferred easements can, consequently, vary somewhat, BLM would continue to handle ownership aspects of 17(b) easements and documents changing, realigning, or releasing the location of a 17(b) easement would need to be processed through the BLM.[26]

4. TERMINATION OF EASEMENTS.

In addition, you ask whether termination of a 17(b) easement requires issuance of an appealable decision. The regulations concerning termination set forth certain standards for determining if termination is proper and require proper notice and an opportunity to be heard.[27] The regulations do not, however, expressly articulate a requirement for issuance of an appealable decision as part of the termination process.

25/ We do not read this to mean that a federal agency can restrict the identified uses of a 17(b) easement on Native corporation land absent sufficient reasons to do so such as an absence of funds to repair a bridge or serious erosion by certain types of vehicles threatening to make the route unuseable as a public access route. Where certain modes of transportation may be unacceptable at the point where the easement goes off Native lands and enters a conservation system unit, the trail can be posted to prohibit those uses at the terminus of the 17(b) easement at the boundary of the servient estate. The level of retained federal interest in the land is simply not enough by itself, however, to achieve a closure of the 17(b) easement to certain uses absent sufficient evidence establishing interference with use of the easement itself. See, Addendums 1 and 2 for a more detailed discussion of these problems; and also see, 36 CFR §§ 1.2(a)(3) and (b).

26/ See, section 1 b and c, and footnote 14, supra.

27/ 43 CFR § 2650.4-7(a)(13).

While the termination regulations are silent on the point, departmental practice is to treat such decisions as appealable. The decision to reserve the easement was incorporated in an appealable decision and the decision to terminate the easement should be given the same treatment and status. BLM's current 17(b) easement conformance procedures follow this view by providing for inclusion of easements to be terminated in an appealable easement conformance decision. The draft proposed 17(b) regulations which the BLM Director circulated for comment in late 1980 also viewed a termination decision as appealable. In addition, making the termination decision appealable is the only way to give procedural protection to individuals potentially affected by such a decision.[28] Moreover, by a memorandum of February 9, 1982, this office approved a set of easement relinquishment documents, including a termination decision, which we assume has been used in all similar cases since that time.[29]

5. RELATED MATTERS

Since this response covers such a wide spectrum of 17(b) easement management issues, it would be opportune to include a summary of past legal opinions dealing with related 17(b) easement management issues.

By a memorandum of March 17, 1980 (Addendum 1), we provided advice regarding trespass enforcement authority on ANCSA reserved easements. In that opinion it was explained that an easement is the right to use the land of another for a specific purpose and is not a possessory interest in the sense of being able to exclude others. Accordingly, the federal land

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28/ 43 CFR 4.410 provides that parties who are in some instances adversely affected or in other instances have affected property interests, have a right to appeal.

29/ This is distinguishable from termination of such easements as continuous shoreline easements, the standard ditches and canals easement, etc. Those easements were found to be improper as a matter of law and cannot be reserved in an ANCSA conveyance. Alaska Public Easement Defense Fund v. Andrus, 435 F.Supp. 664 (D. Alas. 1977). Accordingly, they can be released without issuance of an appealable decision.

manager can only take enforcement activity to prevent interference to the reserved uses and purposes of a 17(b) easement. The managing federal agency does not have adequate legal authority to prevent non-interfering use of a 17(b) easement or to bring a trespass action against an individual who strays off an easement onto the servient estate.

In a related opinion of January 24, 1986 (Addendum 2), the possible use of citation authority on 17(b) easements was discussed. While the basic problem with use of citations to help manage 17(b) easements is the lack of specific BLM regulations, the underlying general problem is that the United States has only retained limited rights in 17(b) easements. It does not have a sufficient interest to close the trail to a particular activity unless the activity is interfering with the easement because the landowner is free to allow or ignore such non-interfering uses as it sees fit.[30]

In a more comprehensive opinion of May 11, 1981 (Addendum 3), broader issues of potential liability and transfer of administration were discussed. Potential liability exists under the Federal Tort Claims Act[31] to the same extent a private party is liable under State law. In Alaska, this means the managing agency is held to a standard of "a reasonable person maintaining his property in a reasonable safe condition in view of all the circumstances."[32] An exception exists for discretionary functions which we think allows for leeway in deciding whether to maintain, improve or close a given easement. Putting the two concepts together, however, where the easement manager knows of a dangerous condition it cannot properly exercise its discretion to ignore the problem. None of these principles preclude closure of a 17(b) easement where lack of manpower or funds prevent the amount of care required to keep the easement in a reasonably safe condition. As far as transfer of easement management is concerned, we opined that

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30/ Vol.2, Thompson, Real Property, supra (n. 19), ("The holder of the fee has the complete control over and use of the land up to the point where such control and use interferes with the use of the easement.").

31/ 28 U.S.C. §§ 1346(b) and 2671-2680.

32/ Webb v. City & Borough of Sitka, 561 P.2d 731, 733 (Alas. 1977).

the administrative duties but not the easement itself could be transferred to any entity willing to assume that obligation. Administration of an easement cannot be transferred to a non-consenting party and cannot be done in such a way that the burden on the servient estate is increased or public access is unreasonably restricted.

Reference to the addenda should be made for a more complete understanding of these related issues.

Dennis J. Hopewell

Attachments: Addendum 1 - Opinion of March 17, 1980
Addendum 2 - Opinion of January 24, 1986
Addendum 3 - Opinion of May 11, 1981

United States Department of the Interior
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ALASKA REGION
4230 University Drive
Suite 300
Anchorage, Alaska 99508-4626

BLM.AK.2064

VIA FAX
(907) 271-4596

March 11, 1996

MEMORANDUM

TO: State Director, Alaska
Bureau of Land Management

FROM: Attorney, Alaska Region
Office of the Solicitor

SUBJECT: National Wildlife Refuge System—
Management of ANCSA Easements

Through the Alaska Native Claims Settlement Act, Congress authorizes conveyance of public lands to Native Corporations. During the conveyance process, the Bureau of Land Management (BLM) often reserves an easement for public access purposes. In that regard, land managers now ask whether such easements should—as a matter of law—be administered by the BLM, or by the bureau whose land is accessed by the easement.

Along with its question, the BLM transmits a document titled: Memorandum of Understanding between the Bureau of Land Management, Alaska; the National Park Service, Alaska Region; and the U.S. Fish and Wildlife Service, Region 7. That document in turn evokes the Alaska Native Claims Settlement Act,[1] and the Alaska National Interest Lands Conservation Act.[2] Based on a review of these materials, this office concludes that: Easements reserved pursuant to the Alaska Native Claims Settlement Act, Section 17(b), should be administered by the bureau whose land is accessed by the easement.

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[1] 43 U.S.C.A. §§ 1601-1629e (1995).

[2] Pub. L. 96-487, 94 Stat. 2371 et seq. (Dec. 2, 1980) (codified as amended in scattered sections of 16 U.S.C., 43 U.S.C., 48 U.S.C.).

BACKGROUND

The Alaska Native Claims Settlement Act (ANCSA) authorizes Native Corporations to select and receive patent to more than 40 million acres of public land in Alaska.[3] While making these conveyances, the Secretary of the Interior is "instructed by section 17(b) of ANCSA to 'reserve such public easements as he determines are necessary.'"[4] Generally, the standard against which the easements are judged is "present existing use."[5]

To date, the BLM has reserved more than two thousand "17(b)" easements.[6] To conform with the law, easements must be specifically located—with legal descriptions tightly drawn, so that the "title and usability" of adjoining lands will remain unclouded.[7] Until they are marked on the ground, however, "there will be much confusion over where those easements are."[8]

In August of 1994, this office prepared a memorandum dealing with administration of a combined Visitor's Center and Headquarters Site for the Alaska Maritime National Wildlife Refuge.[9] The memo concludes that: "The location of the Homer Complex—outside the boundaries of any existing refuge—places it

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[3] 43 U.S.C.A. § 1611(c) (22 million to Villages, 16 million to Regional Corporations); 43 U.S.C.A. § 1613(h) (2 million acres for special purposes and groups).

[4] City of Tanana, 98 IBLA 378, 381 (1987) citing 43 U.S.C. § 1616(b)(3).

[5] 43 C.F.R. § 2650.4-7(3) (1991).

[6] DOI, Interagency Memorandum of Understanding (Dec.12, 1988).

[7] Alaska Public Easement Defense fund v. Andrus, 435 F.Supp. 664, 680 (D.Alaska 1977).

[8] University of Alaska, Changing Ownership and Management of Alaska Lands 23 (1985).

[9] Memo to Director, Region Seven, U.S. Fish and Wildlife Service from the Office of the Solicitor, Alaska Region (August 15, 1994) (Alaska Maritime National Wildlife Refuge—Administrative Site Management Authority) (Homer Memorandum).

outside the scope of current refuge regulations."[10] Reasoning from that conclusion, Refuge Managers now question whether they have management responsibility for "17(b) easements that are outside the refuges but provide access to and from...refuge" lands.[11]

DISCUSSION

The Homer memorandum grounds on a reading of refuge regulations.[12] If it wished to do so, the Service could exercise administrative discretion and extend refuge regulations to include administrative sites—as it has done with National Fish Hatcheries.[13] At Homer, however, the Service has made a different choice; a choice that leaves governance of private activities to "[v]alid municipal ordinances."[14]

On 17(b) easements, the agency has formalized its choice through execution of an interagency memorandum of understanding.[15] In that document, the Service affirms: "Easements that access a [refuge] shall be administered by the [Fish and Wildlife

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[10] See 50 C.F.R. § 25.11(a) (1994) (scope of refuge regulations). Compare 43 C.F.R. § 8365.1 (1994) (scope of BLM regulations).

[11] Letter to Regional Solicitor, Alaska Region from Acting Deputy State Director, Lands and Renewable Resources (May 16, 1995) (emphasis added).

[12] Homer Memorandum at n.19. See VanderMolen v. Stetson, 571 F.2d 617, 624 (D.D.C. 1977) ("It is, of course, a fundamental tenet of our legal system that the Government must follow its own regulations.").

[13] Homer Memorandum at n.18. See 50 C.F.R. § 70.2 (National Fish Hatcheries: Administrative Provisions).

[14] Homer Memorandum at n.23 citing Howard v. Commissioners of Sinking Fund of City of Louisville, 344 U.S. 624, 627 (1953).

[15] DOI, Memorandum of Understanding Between the Bureau of Land Management, Alaska; the National Park Service, Alaska Region; and the U.S. Fish and Wildlife Service, Region 7 (Dec. 12, 1988) (MOU).

Service]."[16] That commitment echoes the instruction set out in the Departmental Manual.[17]

In the absence of site specific regulations, the Service looks to title documents for its management guidelines.[18] To that end, the conveyance regulations provide that "[p]ublic easement provisions shall be placed in interim conveyances and patents."[19] Permitted uses will be specifically listed; and a general provision will provide that "uses which are not specifically listed are prohibited."[20]

Should the Service extend its general regulations to include the 17(b) easements accessing refuge lands, the conveyance instrument will continue as a primary management document.[21] Since "management rights" may vary from easement to easement,

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[16] MOU at V.B. See Memo to State Director, Alaska State Office, Bureau of Land Management from Deputy Regional Solicitor, Alaska Region at n.25 (February 4, 1987) (Management of ANCSA 17(b) Easements).

[17] 601 D.M. 4.2 (September, 1984). See Coggins & Wilkinson, Federal Public Land and Resources Law 303 (2d ed. 1987) (Although "there is little law on the subject...the policy reasons for binding agencies to their policies and procedures in regulations seem to apply to manual provisions as well.").

[18] The situation is closely analogous to the "easement refuges" established during the "Dust Bowl" era. 3 Refuge Manual 2.3B (March, 1982) (RM).

[19] 43 C.F.R. § 2650.4-7(d)(1) (emphasis added). See ANILCA § 1410, 94 Stat. 2496 (functional equivalency of interim conveyances and patents.).

[20] 43 C.F.R. § 2650.4-7(d)(2). The document must also contain a provision protecting "valid existing right[s]." 43 C.F.R. § 2650.4-7(d)(5).

[21] See Memo to Director, Region Seven, U.S. Fish and Wildlife Service from the Office of the Solicitor, Alaska Region (February 22, 1996) (Kodiak National Wildlife Refuge—Management of Conservation Easements).

only the original instrument can adequately define their scope.[22] And such definition is essential "before considering any management program on easement" lands.[23]

SUMMARY

By authority of ANCSA section 17(b), the BLM has reserved more than two thousand public access easements. In that regard, land managers now ask after the proper managing agency. Based on a review of applicable law, and the submitted file materials, it is the conclusion of this office that: An easement reserved pursuant to the Alaska Native Claims Settlement Act, section 17(b), should be administered by the bureau whose land is accessed by the easement.

Keith A. Goltz

cc: Associate Solicitor
Division of Land and Water Resources
Attn: Assistant Solicitor
Branch of Public Lands

Manager, Alaska Maritime National Wildlife Refuge
U.S Fish and Wildlife Service

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[22] See 3 RM 1.5B (March, 1982) ("An easement restricts but does not abridge the rights of the fee title owner to the use and enjoyment of his land.").

[23] 3 R.M. 2.3B (March, 1982).

United States Department of the Interior

OFFICE OF THE SOLICITOR
ALASKA REGION

4230 University Drive
Suite 300
Anchorage, Alaska 99508-4626
(907) 271-4131

BLM.AK.2676

May 9, 2003

MEMORANDUM

TO: Terry Hassett, 17(b) Specialist
Alaska State Office, Bureau of Land Management (932)

FROM: Dennis J. Hopewell, Deputy Regional Solicitor
Alaska Region

SUBJECT: Merger of 17(b) Easements

Over the course of the past few months, we have been working together and considering the issue of merger of 17(b) easements when land is acquired by the United States. We have talked with other federal land managers who manage acquired lands that were once conveyed subject to 17(b) easements, have met with representatives of the U.S. Forest Service, and have considered a legal research paper presented by the Forest Service.

The fundamental starting point has to be an evaluation of the types of property interests involved in our particular merger situation. A 17(b) easement, reserved to the United States under section 17(b) of the Alaska Native Claims Settlement Act (ANCSA),[1] provides public access across land conveyed under ANCSA so that the public can get to isolated areas of public land or water. The 17(b) easement is considered the "dominant" property interest and the land it crosses is denoted as a "servitude" since it serves the dominant easement. When ownership of the easement and the servitude are joined in one owner, the general rule of property law is that the easement is automatically extinguished by the merger of title.[2] The rationale is easy to understand. An easement is the legal right to use property owned by another.[3] An owner does not need an easement to cross or use his own land and some legal authorities have said that an owner cannot

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[1] 43 U.S.C. § 1616(b).

[2] 2 Restatement of the Law of Property, Servitudes, § 7.5 at 365 (1998); Bruce, Law of Easements and Licenses, § 9.09 at 9-54 (1988); 4 Powell on Real Property, § 34.22 at 34-203 (2000).

[3] 7 Thompson on Real Property, § 60.08(b)(1) at 480 (Thomas Ed. 1994); 4 Powell on Real Property, *supra* note 2, § 34.22 at 34-205.

even have an easement on his own land.[4] Accordingly, when the owner of an easement acquires the land over which the easement passes, the "servitude," there is no need for the easement and it is considered extinguished as a matter of law. In order for the doctrine of merger to apply, "[t]he ownership of the two estates must be co-extensive and equal in validity, quality and all other circumstances of right."[5] In addition, as with most general rules, there are exceptions to the application of the merger doctrine.

In this vein, the U.S. Forest Service has asserted that it did not intend for 17(b) easements to be extinguished by merger of title when it acquired certain lands that had been conveyed to Native corporations subject to 17(b) easements. On the other hand, officials of the U.S. Fish and Wildlife Service have verified that the Service intended merger to occur when that agency acquired land subject to such easements for inclusion in the National Wildlife Refuge System. This difference in intent can be recognized and accommodated under the merger doctrine and the exceptions to that doctrine. As stated above, for the merger doctrine to apply, the merging property interests must be essentially co-extensive and equal in nature. In the Wildlife Refuge instance, public access to isolated tracts of refuge land that was previously provided by 17(b) easements across ANCSA corporation land is now available on the acquired lands and there is no further need for a 17(b) easement. However, it appears that there may be a continuing need for 17(b) easements on lands acquired for inclusion in the National Forest System. These potentially unmet access needs are best assessed by the land managing agency and can include access to leasehold interests, private inholdings and adjoining lands, or ways of necessity.[6] Where the federal land managing agency is aware of legitimate third party uses of 17(b) easements that could not be accommodated if the easements were extinguished that could be the basis for not applying the merger doctrine.

It could also be argued that the possibility of a reverter, which exists in some of the acquisitions of land with 17(b) reservations, is sufficient to prevent application of the merger of title doctrine. There is, however, divergent legal authority on this matter and we think issues of intent and third party interests are more relevant inquiries.[7]

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[4] 7 Thompson on Real Property, *supra* note 3, § 60.08(b)(1) at 478; 28A C.J.S. Easements, § 124 at 306.

[5] 7 Thompson on Real Property, *supra* note 3, § 60.08(b)(1) at 480.

[6] *See*, Bruce, Law of Easements and Licenses, *supra* note 2, § 9.09 at 9-54; 28A C.J.S., Easements, § 123 at 308; *Brush Creek Airport v. Avion Park*, 57 P.3d 738, 747-748 (Colo. App. 2002).

[7] Based on the rationale for the merger doctrine, that an owner does not need and cannot have an easement on his own land, it seems that the remote possibility of a reverter at some future date is not enough to prevent application of the general rule in the absence of more compelling circumstances. It is also possible that 17(b) easements could be considered

Accordingly, we endorse a policy position where BLM follows the general property rule and considers 17(b) easements to be extinguished by merger of title when the United States acquires land subject to such easements unless the acquiring federal agency asserts an exception to the general rule. If an agency asserts an exception, BLM will not take a position on the sufficiency of the assertion but will leave the 17(b) easements on the federal land records maintained by BLM. Absent the timely assertion of an exception by the acquiring federal land manager, when the United States acquires ownership of the land, the 17(b) easements that cross that land shall be deemed to have been extinguished by operation of the doctrine of merger. Easements that have been extinguished by merger can be removed from the federal land records maintained by BLM without the need for issuance of a termination decision.

cc (by fax):

Sharon Janis, Chief, Division of Realty, U.S. Fish and Wildlife Service, Region 7
Chuck Gilbert, Lands Team Leader, National Park Service, Alaska
Maria Lisowski, Attorney, Office of General Counsel, Dept. of Agriculture, Alaska
Barry Roth, Attorney, Div. of Parks and Wildlife, Office of the Solicitor

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suspended until such time as a reverter actually occurred. *See*, 2 Restatement of the Law of Property, Servitudes, § 7.5d at 368 (1998).

United States Department of the Interior

BUREAU OF LAND MANAGEMENT
Alaska State Office
222 W. 7th Avenue, #13
Anchorage, Alaska 99513-7599

AA-8096-EE (75.04)
AK932 (trh)

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

JUL 2 4 2003

National Park Service
Attn: Chuck Gilbert
240 West 5th Avenue
Room # 114
Anchorage, Alaska 99501

Dear Sir:

The National Park Service, U.S. Fish & Wildlife Service, U.S. Forest Service (USFS) and Bureau of Land Management (BLM) acquired land conveyed to various Native corporations under the Alaska Native Claims Settlement Act (ANCSA). Some of the land purchased contained reservations to the United States for easements reserved under section 17(b) of ANCSA. The general rule of property law is that the merger of title automatically extinguishes an easement when the ownership of an easement and the land are joined in one owner[1]. However, there are exceptions to the general rule. The USFS believes its situation is an exception to the general rule and title did not merge. The other agencies believe that title did merge.

BLM is requesting that your agency inform us in writing of its position within 30 days from receipt of this letter. Please state that (1) title to the section 17(b) easements and title to the land acquired merged within lands managed by your agency or (2) your acquisitions are an exception to the general rule and title to the section 17(b) easements and title to the land acquired did not merge within lands managed by your agency. Justification for your agency's position is not necessary, as BLM will not take a position on your assertion.

Easements that are extinguished will be removed from the easement maps and shown as closed in the easement database. The documentation about the extinguished easement will be maintained in the case file(s). In both situations, the land acquired will be shown on the records as land owned/acquired by the United States.

[1] See the attached May 9, 2003, Memorandum from Dennis J. Hopewell, Deputy Regional Solicitor, Alaska Region.

Please contact Terry Hassett at 271-3229 if you have questions.

Sincerely,

Mike Haskins

Mike W. Haskins
Chief, Branch of Lands and Realty

Enclosure:
May 9, 2003, Memorandum (3 pp)

Identical Letters To:
U.S. Forest Service (CM-RRR)
Alaska Region
Attn: Regional Forester
P.O. Box 21628
Juneau, Alaska 99802-1628

U.S. Fish and Wildlife Service (CM-RRR)
Attn: Sharon Janis
1011 East Tudor Road
Anchorage, Alaska 99503

cc

State Of Alaska
Department of Natural Resources
Division of Mining, Land and Water
Attn: Sandra J. Singer
Chief Realty Section
550 West Seventh Avenue, Suite 1050A
Anchorage, Alaska 99501-3579
with enclosure

State of Alaska
Division of Habitat and Restoration
Attn: Robin Willis
333 Raspberry Road
Anchorage, Alaska 99518-1599
with enclosure

Dennis J. Hopewell
Deputy Regional Solicitor, Alaska Region

UNITED STATES DEPARTMENT OF THE INTERIOR
Office of the Solicitor
Alaska Region
4230 University Drive
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Telephone (907) 271-4131 Fax (907) 271-4143

FAX TRANSMITTAL

DATE: December 21, 2006

TO: Brenda Becker, Realty Specialist, Glenallen Field Office, BLM

FAX NO.: 907 822-3120

FROM: Dennis Hopewell, Deputy Regional Solicitor

SUBJECT: CNI Agreement Easements

PAGES: 4

MESSAGE: If I remember your question correctly, you wanted to know if the Forest Service and Chugach Native Regional Corp. could just agree to the on-the-ground location of easements reserved pursuant to the CNI Agreement. The answer is yes, the CNI Agreement, particularly paragraph 13E, provides for the on-the-ground relocation of easements. A copy of paragraph 13E is included in this fax as is a copy of some email advice Terry Hassett provided, and I approved, in the past. Hassett's email reaches the same conclusion as me but the email also includes a lot of what I would characterize as optional policy procedures. The important thing for BLM purposes is that the CNI Agreement provides authority for the relocation of easements without the normal, and more formal, donation and relinquishment procedures that must be followed in ordinary circumstances. I hope this fully answers your questions and that you have a happy holiday season and a great new year.

(6) Marine shoreline easements shall comprise that area of land from the mean high tide line to 50 feet upland.

13 E. The parties agree that the easements reserved herein are generally described without the benefit of a field survey and that the location or relocation of the easements shall be permitted and governed by the feasibility of construction, maintenance, use and the avoidance of unnecessary costs or time delays due to unfavorable engineering requirements; unsuitable terrain such as excessive slope, erosive surface, muskeg, wetlands and other hazards; or potentially adverse impacts on or disruption to fish, wildlife, or botanical resources. To the extent feasible, easements shall be relocated within the aliquot parts described in subparagraph B of this paragraph. Relocation shall be accomplished only after prior consultation with CNI, and no relocation shall be made in a location which physically interferes with a facility used by CNI. Upon utilization of a located or relocated easement, the easement is vested at its actual location.

F. All reservations for road and trail easements are for the benefit of the United States, the State of Alaska, and the general public for and in furtherance of the following uses and purposes:

(1) The construction, use, and maintenance of roads, trails, ditches, bridges, culverts, areas for parking,

Dennis
Please review my comments to USFS concerning changes to CNI easement locations. 3
Thanks Terry Hassett 3229

Terry Hassett/AKSO/AK/BLM/DOI
05/24/2005 09:21 AM

To Andrew J Schmidt <ajschmidt@fs.fed.us>
cc Andrew J Schmidt <ajschmidt@fs.fed.us>, Maria Lisowski <mlisowski@fs.fed.us>, rrogers@chugach-ak.com, terry_hassett@blm.gov
bcc
Subject Re: CNI easement corrections

JUN 10 2005

6/15 left v. msg
Andy
I would follow the requirements of paragraphs 13E (page 96) and 30 (pages 134 and 135). I would document the changes with a written agreement, the signed survey plats and a CAC board resolution. Para 30A requires a formal ratification and written agreement by the parties. The document should be signed by your Regional Forester.

The agreement should treat the changes as substantive errors. The error occurred as the location of the trails and sites were based on maps and without the benefit of a field survey, changes in the shoreline resulting from the 1964 earthquake and to avoid CAC improvements (logging roads) and slash from the logging operations. Add whatever other reasons that seem reasonable. Briefly discuss that USFS and CAC representatives jointly located the easements, the locations avoid improvements and any planned improvements by CAC and are mutually agreeable to each other and are located in topographically usableable locations. The new locations are marked on the ground and shown on plats. The plats will be recorded and the complete package sent to BLM to update and document its records.

Add whatever else you deem important to document. Written documentation is extremely important.

I will send this to Dennis Hopewell for his comments
Terry

Andrew J Schmidt <ajschmidt@fs.fed.us>

Andrew J Schmidt <ajschmidt@fs.fed.us>
05/24/2005 07:39 AM

To terry_hassett@blm.gov
cc rrogers@chugach-ak.com, Maria Lisowski <mlisowski@fs.fed.us>, Andrew J Schmidt <ajschmidt@fs.fed.us>
Subject CNI easement corrections

Terry - Thank you for the discussion and direction yesterday related to correcting CNI easements and working toward including them in the confirmatory patent. What will BLM need to show that CAC and FS have agreed to these corrections? Yesterday we discussed the need to have letter or agreement that described why these corrections are necessary, relating them to the provisions in the CNI settlement agreement and describing the corrections for each CNI easement (correct description similar to current CNI wording with correct aliquot part). Can this be done in letters from the regional Forester and one from CAC that basically read the same and have the same attachment or will an agreement signed by both parties be needed? I would also want to include plats with signature blocks for the Regional Forester and CAC official authorized by

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board resolution stating these are the correct location of CNI easement #. I believe your solution is a good way to correct the location of these easements and would like your input to make sure we cover the basis in the most efficient manner for BLM. Thank you. - Andy

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BLM.AK.3896 (2650)
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May 17, 2007

MEMORANDUM

TO: Dave Mushovic, Realty Specialist, Branch of Lands and Resources
Alaska State Office, Bureau of Land Management (932)

FROM: Dennis J. Hopewell, Deputy Regional Solicitor, Alaska Region

SUBJECT: ANCSA 17(b) Easement Handbook

You informally requested our legal review of the draft ANCSA 17(b) Easement Handbook. I have completed that review and find the draft handbook to be legally sufficient. The draft handbook does a good job of covering the wide variety of 17(b) easement issues and of pulling together, as appendices, the relevant resource and background materials. I have handwritten my answers to your questions and comments on the draft on the attached copy of the draft easement handbook.

The draft 17(b) easement handbook contains a number of policy cuts on how to handle various management issues, especially on the expenditure of money and resources on various management activities. All of the policy decisions I saw in the draft are consistent with applicable law.

If you have more questions or would like to meet to discuss some of my comments, please call 271-4186 (and leave a message if I am not able to personally answer your call).

attachment: annotated copy of draft 17(b) easement handbook

United States Department of the Interior

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2920 (AK-932)

May 24, 2007

Memorandum

To: Case File

From: David Mushovic, Realty Specialist (932)

Subject Solicitor's Review of ANCSA 17(b) Easement Management Handbook

The Regional Solicitor's Office May 17, 2007 comments have been incorporated into the 17(b) Easement Management Handbook. In addition to reviewing the handbook Dennis Hopewell, Deputy Regional Solicitor, supplied an informal response to specific questions regarding the management of 17(b) easements. The following responses to these questions are quoted below:

Q. Is the donation and release process to relocate an easement a discretionary action for the BLM?

A. "Yes, it's definitely discretionary."

Q. Specifically is the BLM legally required to process a donation and release proposed by the State and a Native Corporation. Particularly on easements accessing state lands?

A. "No there is no hard & fast legal requirement."

Q. Can the BLM require the state to take administration of an easement if they want it relocated?

A. "No the BLM cannot require the state to assume administration, but BLM can condition relocation on the State agreeing to take administration."

Q. What legal responsibility does the BLM have to reclaim or rehab an easement for an existing trail before terminating the easement?

A. "Responsibility would come from other legal authorities and would need to be addressed on case by case basis. I think it's possible that BLM would not have to do such things as revegetating or regrading the surface."

Q. To what extent could the state process or perform required action in the acquisition of an easement for example haz mat clearance CIP title insurance etc?

A. " CIP has to be performed by a federal agency involved in the acquisition. It might be possible to use a State Haz Mat report. The State could finance , help or provide most of the documents, but BLM has to do the CIP and make all discretionary decisions."

Q. Can we require the state to pay for the cost of relocating an easement accessing state lands?

A. " Again, there is no authority to make the State pay, but BLM could condition the relocation on State's willingness to bear all or part of the costs. For instance, federal agencies have been able to us haz mat reports provided by the State."

Q. The Regional Solicitor's Opinion dated January 24, 1986 addresses 43 CFR 8300, 8360, and 8341.1(f) as lacking sufficient authority for issuing a citation for blocking or preventing use of a 17(b) easement. Can 43 CFR 9239.2-1 (unlawful enclosures and preventing access to public lands) be used to issue a citation for blocking or preventing use of a 17(b) easement?

A. "In unique circumstances, a third party who holds no interest or title in the land and cannot claim a good face defense, may be issued a citation pursuant to 43 CFR 9239.2-1 for blocking or otherwise preventing the public from using an easement to access public lands. However, discretion must be applied due to the higher standard that must be met (beyond reasonable doubt) than that required to take civil action. In most cases it may be better to take civil action, especially against a Native Corporation who has a title or interest in the land, and could have a positive defense in protecting their property rights. Any criminal action should be done in close coordination with the Regional Solicitor's Office.